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OFFICE OF THE
EXECUTIVE SECRETARY

VIA HAND DELIVERY

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

**Re: Amendment to the Application of Memphis Networx, LLC for
a Certificate of Public Convenience and Necessity to Provide
Intrastate Telecommunications Services and Joint Petition of
Memphis Light, Gas and Water Division, a Division of the
City of Memphis, Tennessee ("MLGW") and A&L Networks -
Tennessee, LLC ("A&L") for Approval of Agreement Between
MLGW and A&L Regarding Joint Ownership of
Memphis Networx, LLC
Docket No. 99-00909**

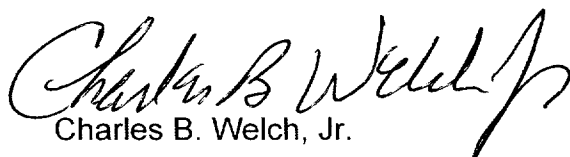
Dear Mr. Waddell:

Enclosed for filing please find the original and thirteen (13) copies of the Brief filed on behalf of Tennessee Cable Telecommunications Association, and Time Warner Communication of the Mid-South, and Time Warner Telecom of the Mid-South, LLP's in the above-referenced docket as requested in the Pre-Hearing Officer's Order of February 9, 2001. Copies are being served on parties of record.

If you have any questions, please contact me.

Very truly yours,

**FARRIS MATHEWS BRANAN
BOBANGO & HELLEN PLC**


Charles B. Welch, Jr.

CBW:lw

Enclosures

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: APPLICATION OF MEMPHIS)	
NETWORK, LLC FOR A CERTIFICATE OF)	
PUBLIC CONVENIENCE AND)	
NECESSITY TO PROVIDE INTRASTATE)	
TELECOMMUNICATIONS SERVICES)	
AND JOINT PETITION OF MEMPHIS)	DOCKET NO. 99-00909
LIGHT GAS AND WATER DIVISION,)	
A DIVISION OF THE CITY OF MEMPHIS,)	
TENNESSEE ("MLGW") AND A&L)	
NETWORKS-TENNESSEE, LLC ("A&L"))	
FOR APPROVAL OF AGREEMENT BETWEEN)	
MLGW AND A&L REGARDING JOINT)	
OWNERSHIP OF MEMPHIS, NETWORK, LLC.)	

**BRIEF FILED ON BEHALF OF
TIME WARNER TELECOM OF THE MID-SOUTH, L.P.
TIME WARNER COMMUNICATIONS OF THE MID-SOUTH, AND THE
TENNESSEE CABLE TELECOMMUNICATIONS ASSOCIATION**

Time Warner Telecom of the Mid-South, L.P. ("Time Warner Telecom"), Time Warner Communications of the Mid-South ("Time Warner Communications"), and the Tennessee Cable Telecommunications Association ("TCTA") (collectively "the Intervenor") file this brief, pursuant to the Order of the Tennessee Regulatory Authority ("TRA" or "the Authority") entered on February 9, 2001, to address the following issues:

1. a. Do Tenn. Code Ann. § 65-25-231(a)(2) and § 7-52-402 apply to the Telecommunications Division of the Electric Division of Memphis Light Gas & Water?
- b. Does Tenn. Code Ann. § 65-25-231(a)(2), § 7-52-402, or any other statute permit the equity investment in Memphis Network by the Telecommunications Division of the Electric Division of Memphis Light Gas & Water to Memphis Network, LLC?

2. Please identify and explain the criteria the Authority should use when approving an operating agreement under Tenn. Code Ann. § 7-52-103(d).
3.
 - a. Was Memphis Light, Gas & Water required to issue a Request For Proposal?
 - b. What procedural requirements must Memphis Light, Gas & Water follow when proceeding through the Request for Proposal process?
 - c. Assuming Memphis Light, Gas & Water was not required to issue a Request for Proposal, was it bound to follow the procedural requirements discussed in the answer to b. once it chose to issue a Request for Proposal?
 - d. Assuming Memphis, Light Gas & Water was required to issue a Request for Proposal, but failed to follow the requirements discussed in the answer to b., how is the transfer of interest from A&L Networks-Tennessee, L.L.C. to Memphis Broadband affected?

RESPONSES TO LIST OF ISSUES FOR BRIEFING

1.
 - a. **Do Tenn. Code Ann. § 65-25-231(a)(2) and § 7-52-402 apply to the Telecommunications Division of the Electric Division of Memphis Light, Gas & Water?**

Neither T.C.A. § 65-25-231(a)(2) nor T.C.A. § 7-52-402 applies to the Telecommunications Division of the Electric Division of Memphis Light, Gas & Water Division ("MLG&W"). Section 65-25-231(a)(2) of the Code allows an "electric cooperative" participating in a "telecommunications joint venture" to dedicate a reasonable portion of the electric plant to the provisions of these telecommunications services, allocating costs for regulatory purposes, and also allows "electric cooperative" to lend funds to acquire, construct and provide working capital for the system, plant and necessary equipment, again allocating costs for regulatory purposes. T.C.A. § 65-25-

231(a)(2). This statutory provision also states that no electric cooperative nor any other entity participating in a telecommunications joint venture may provide subsidies for telecommunications services. Id.

The only question to answer is whether the Telecommunications Division of the Electric Division of MLG&W is an “electric cooperative”.¹ The statute allows only an “electric cooperative” participating in a telecommunications joint venture to dedicate a portion of its plant to the provisions of these services and to lend funds to acquire, construct and provide working capital. A “cooperative” is defined by T.C.A. § 65-25-202(4) as “one (1) or more nonprofit cooperative membership corporations heretofore and hereafter organized under or otherwise subject to this part,” T.C.A. § 65-25-202(4) (emphasis added). The statutory scheme addressing the powers and duties of an electric cooperative in Tennessee clearly do not cover a “division” of another division of MLG&W. A cooperative must have a “primary purpose” of supplying electric power and energy services to one or more patrons at wholesale or retail cost or supplying, furnishing or exchanging wholesale power and energy to or with another entity. T.C.A. § 65-25-204(a)(1). The Telecommunications Division of the Electric Division clearly does not have either of these primary purposes. In fact the Telecommunications Division is merely an account with no employees -- it has no purpose to supply wholesale or retail electric power.

¹ As stated above, T.C.A. § 65-25-231(a)(2) provides that neither an electric cooperative nor any other entity participating in a telecommunications joint venture may provide subsidies for such services. Thus, the Telecommunications Division may not provide subsidies for its services. This is so because the Electric Division, whether or not it is not considered an “electric cooperative”, would be an “other entity participating in a telecommunications joint venture” pursuant to the statute.

Further, electric cooperatives as defined by statute are not-for-profit cooperatives and “nonutilities”, “exempt in all respects from the jurisdiction and control of the Tennessee regulatory authority.” T.C.A. § 65-25-223. The Telecommunications Division of the Electric Division of MLGW is not exempt from regulation by the TRA. Thus, the Telecommunications Division does not meet the definition or criteria of an “electric cooperative” pursuant to Tennessee law, and the provisions of T.C.A. § 65-25-231(a)(2) do not apply to it.

Section 7-52-402 of the Tennessee Code Annotated is structured very similarly to T.C.A. § 65-25-231(a)(2). Section 7-52-401 of the Tennessee Code Annotated provides that a municipality operating an electric plant has the power and is authorized to:

acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment for the provision of telephone, telegraph, telecommunications services, or any other like system, plant, or equipment within and/or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality, in compliance with Title 65, Chapters 4 and 5, and all other applicable state and federal laws, rules and regulations.

T.C.A. § 7-52-401. Section 7-52-402 of the Tennessee Code Annotated goes on to provide, in the same manner that T.C.A. § 65-25-231(a)(2) provided, that a municipality providing such telecommunications services is authorized to dedicate a reasonable portion of the electric plant to the provision of such services, allocating costs for regulatory purposes, and to lend funds, to acquire, construct and provide working capital for the system, plant, and equipment necessary, provided that such interest costs shall be allocated to the cost of such services for regulatory purposes. T.C.A. § 7-

52-402. This statutory provision also requires that “a municipality providing any of the services authorized by § 7-52-401 shall not provide subsidies for such services.” Id.

Section 7-52-402 of the Tennessee Code Annotated does not apply to the Telecommunications Division of the Electric Division of MLG&W. Section 7-52-402 allows only “a municipality providing such services” to be able to lend funds in this context. T.C.A. § 7-52-402 (emphasis added). In this case, the Telecommunications Division of the Electric Division of MLG&W is not providing any services. According to the testimony of several MLG&W witnesses, the investment in Memphis Networx is passive. As stated above, the Telecommunications Division is merely an account. MLG&W, through the Electric Division or the Telecommunications Division, is not providing telecommunications services. It is attempting to finance such services through Memphis Networx, LLC and the other entities. Thus, the provisions of T.C.A. § 7-52-402 clearly do not apply to the Telecommunications Division of the Electric Division of MLG&W.

b. Does Tenn. Code Ann. § 65-25-231(a)(2), § 7-52-402, or any other statute permit the equity investment in Memphis Networx by the Telecommunications Division of the Electric Division of Memphis Light, Gas & Water to Memphis Networx, LLC?

Neither T.C.A. § 65-25-231(a)(2) or T.C.A. § 7-52-402 address “equity investment.” Because the Intervenors contend that the provisions of T.C.A. § 65-25-231(a)(2) and T.C.A. § 7-52-402 do not apply in any way to the Telecommunications Division of the Electric Division of MLG&W, the Intervenors assert that neither of these statutory provisions permits the equity investment by the Telecommunications Division to Memphis Networx, LLC.

Ordinance No. 3054, enacted on November 4, 1980, amended the City of Memphis/MLG&W Charter. As evidenced by the preamble of Ordinance No. 3054, it was passed to modernize MLG&W and add flexibility in its organization to deal with new energy systems, such as artificial gas and solar power. This ordinance, therefore, primarily dealt with energy systems.

Further, Ordinance No. 3054 provides:

The Board of Light, Gas & Water Commissioners shall provide for the investment and reinvestment of its funds and reserves as determined in the discretion of the Board of Commissioners and the funds of all divisions may be combined for the purpose of obtaining the best investment. The Board shall not be limited as now provided but shall be able to make such investments as authorized by state law and as the Board of Light, Gas & Water Commissioners may deem best with such security as the Board may deem proper. Any profit or loss resulting from any such investment or reinvestment shall be credited or charged to the several divisions in proportion to the respective funds so invested and reinvested.

Ordinance No. 3054, Light, Gas and Water Division Amendments (November 4, 1980) (emphasis added). This Ordinance does not permit the passive investment in Memphis Network by the Telecommunications Division of the Electric Division of MLG&W because such investment is not authorized by state law. As stated above, the state statutes do not authorize such investment.

2. Please identify and explain the criteria the Authority should use when approving an operating agreement under Tenn. Code Ann. § 7-52-103(d).

It is the duty of the Tennessee Regulatory Authority to ensure that all of the laws of Tennessee over which it has jurisdiction are enforced and obeyed, that violations thereof are promptly prosecuted, and that all penalties due to the State of Tennessee

are collected. T.C.A. § 65-1-213. The TRA has general supervisory and regulatory power, jurisdiction and control over all public utilities, and also over their property, property rights, facilities and franchises. T.C.A. § 65-4-104. The powers of the TRA in this context are very broad. The General Assembly determined that any joint venture must be approved by the TRA and did not set any specific standards or criteria for such approval. The General Assembly intentionally made the TRA's approval powers broad to allow the TRA the power to review and determine if an agreement is in the public interest. Time Warner Telecom, Time Warner Communications and the TCTA maintain based upon a review of the statutory relevant factors set forth at T.C.A. § 65-4-113(b) of "the suitability, the financial responsibility and the capability" of the Applicant and Joint Petitioners, the Agreement should not be approved. Further, based upon the TRA's broad authority beyond those statutory requirements, Time Warner Telecom, Time Warner Communications and the TCTA maintain that the proof in this proceeding has shown that based upon the exhibits, the conduct and course of dealing of the Applicant and Joint Petitioners prior to and after the selection of Mr. Lowe, and the filing of the application herein and the shifting of documents, the Agreement should not be approved.

3. a. Was Memphis Light, Gas & Water required to issue a Request For Proposal?

A Request for Proposal was issued by MLG&W. However, MLG&W did not conduct the process fairly and it resulted in an unfair conclusion, not only to Time Warner, but to other prospective respondents and to those who actually responded. On June 10, 1998, Mr. Lowe and Joel Halvorson of Arthur D. Little, Inc. met with such

MLG&W executives as Larry Thompson, Kenneth Olds, Gene Crawford, Mike Kissell, Jim Montcrief and Herman Morris to begin the formation of Memphis Networx. See Exhibit No. 42 to Intervenor's previously-filed Pre-Hearing Brief. A study, estimated at \$100,000.00 plus expenses, was produced on July 15, 1998, titled "Initial Report of Arthur D. Little." See Exhibit No. 64 to Intervenor's previously-filed Pre-Hearing Brief. The executive summary of this report states that "prior to issuing the request for proposal, there are several key questions that must be addressed by the MLGW executive team." Id. (emphasis added). Unlike any other entity, Mr. Lowe had at least four (4) weeks of unrestricted access to MLG&W assets and employees prior to the issuance of the Request for Proposal. See Hearing Transcript, Vol. VIIB, p. 66, lines 11-16. Mr. Lowe had at least five (5) months to respond. Unlike any other entity, Mr. Lowe was given a draft copy of the Request for Proposal as early as September 2, 1998 and, in fact, his representatives helped prepare the Request for Proposal. See Exhibit No. 46 to Intervenor's previously-filed Pre-Hearing Brief. All the while, MLG&W met with Time Warner representatives and BellSouth representatives and never provided them with a copy of a Request for Proposal or allowed any other prospective respondent the opportunity to comment.

The Request for Proposal's provisions, mandatory pre-bid meeting requirements and deadlines discouraged responses. The fact that an interested party had about a month, given Mr. Lowe's access to respond, is patently unfair. Further, the Request for Proposal required that "[a]ll documents as required of this project are and shall remain property of the Division whether the project for which they are made is executed or not." Exhibit 81 to Intervenor's previously-filed Pre-Hearing Brief. Few companies would be

interested in spending a rushed month creating a response to a Request for Proposal, lose a bid and then still be required in relinquishing property rights to documentation in the Request for Proposal including market plans. Significantly, Mr. Lowe did not relinquish his documents even though he was the successful bidder. Hearing Transcript, Vol. XIB, p. 10-15. The Request for Proposal was also never signed by Mr. Lowe, as was the custom and practice of MLG&W. Thus, the procedures initiated by MLG&W included a Request for Proposal, but proper procedure was clearly not followed as the ultimately successful bidder had access to the Request for Proposal months before other entities, the request was designed to discourage responses and the ultimately successful bidder never signed the Request for Proposal because a different agreement was reached. The record is replete with evidence of the improper manner in which the Request for Proposal process was conducted. The proof has shown that Mr. Lowe was preselected. Lowe's consultants, Arthur D. Little, Inc., even acknowledged that Lowe had been given a "competitive advantage" in the process. After Lowe had been officially selected in early 1999, MLG&W and Lowe then contracted with each other for Lowe to conduct a \$450,000.00 study of the telecommunications industry in Memphis, even though the study was paid for with public ratepayer money. No other conclusion can be reached but that this agreement was structured in this manner by public officials and Lowe to circumvent the Tennessee Open Records Law. Later, Lowe was formally reimbursed for his pre-bid expenses agreed to in July, 1998. It is the Intervenor's position that Lowe and MLG&W used the materials gathered from other respondents in their scheme to advance their entry into the telecommunications business.

MLG&W is subject to various statutory schemes governing competitive bidding requirements for the purchases of goods and services. These statutes required competitive bidding for the proposal at issue in this matter. Competitive bidding would generally necessitate a Request for Proposal. These schemes are the Municipal Electric Plant Law of 1935, codified at T.C.A. §§ 7-52-101 - 7-52-310 (the “Electric Plant Law”), the Municipal Purchasing Law of 1983, codified at T.C.A. §§ 6-56-301 - 6-56-306 (the “Purchasing Law”), and statutes addressing purchases for local government units codified at T.C.A. §§ 12-3-1001 - 12-3-1010.

The Electric Plant Law authorizes municipalities, among other things, to own and operate electric power plants. T.C.A. § 7-52-103. The TRA has already recognized the applicability of T.C.A. § 7-52-101 et seq. in its request for interpretation of T.C.A. § 7-52-103(d). Municipalities are authorized to establish a board of public utilities for such plants. T.C.A. § 7-52-107. Such board is authorized to appoint a superintendent to operate the system on a day-to-day basis. T.C.A. § 7-52-114(b). The superintendent is, therefore, an employee of the municipality. See Weakley County Municipal Elec. Sys. v. Vick, 43 Tenn. App. 524 (1957). The Electric Plant Law can be utilized by municipalities that are either incorporated cities and towns or counties. T.C.A. § 7-52-102(10). Under the Electric Plant Law, the superintendent must advertise for bids for any work or construction exceeding \$50,000.00. T.C.A. § 7-52-117(d).

The Purchasing Law was enacted along with a companion law for counties, the County Purchasing Law of 1983, codified at T.C.A. §§ 5-14-201 - 5-14-206. The Purchasing Law was made a part of Title 6 of the Tennessee Code Annotated, which governs municipalities that are incorporated cities and towns. The Purchasing Law very

broadly applies to “all purchases by authorized officials in all municipalities using or encumbering municipal funds,” with exceptions that do not affect the matter at hand. T.C.A. § 6-56-301. When analyzed without considering the effect of the Electric Plant Law, the Purchasing Law also clearly applies to MLG&W, because the system is a department of the City and it also uses and encumbers “municipal funds” when making purchases. See Tenn. Att’y Gen. Op. 83-308 (Sept. 12, 1983). Under the Purchasing Law, purchases greater than \$2,500.00 must be publicly advertised and competitively bid. T.C.A. § 5-14-204.

Competitive bidding is also required by T.C.A. § 12-3-1007, a provision in the statutory scheme outlining purchases for local government units. This statutory section is applicable to local governmental units. In any municipality, county or metropolitan government, a “purchase, lease, or lease-purchase” must be preceded by competitive bidding or competitive proposals if the purchase, lease, or lease-purchase exceeds \$10,000.00. This statutory section is another example, taken along with the Electric Plant Law and the Purchasing Law, that competitive bidding is required for a proposal such as the one suggested by Memphis Networx in this matter.

Section 2-256 of the Code of Ordinances, City of Memphis, addressing the administration of MLG&W, states:

Sec. 2-256. Advertising necessary as prerequisite to contract award.

No contract for equipment, apparatus, materials or supplies for the light, gas and water division involving more than \$50,000.00 shall be made except after such contract shall have been advertised in the manner now or hereafter provided by law, for the advertisement of contracts of the city. On any contract for equipment, apparatus, materials, or supplies involving more than \$15,000.00 but less than

\$50,000.00 the bid procedure of the purchasing department of light, gas and water division shall be used.

Code of Ordinances, City of Memphis, Ord. No. 3104, § 1.3-17-81; Code 1967, § 2-325; Ord. No. 4380, 12-19-95. Advertising is thus required for MLG&W contracts. Section 2-277(c)(1) of the Code of Ordinances, City of Memphis also provides, with regard to finances, purchasing and disposition of property:

Sec. 2-277. Purchase of goods and supplies.

(c)(1) Notwithstanding any other provision of the Charter or Code of Ordinances, no contract for equipment, apparatus, material, supplies, goods or services for the city involving more than fifty thousand dollars (\$50,000.00), shall be made except after said contract shall have been advertised in a newspaper of daily circulation for two (2) consecutive days in the week preceding the day on which bids are to be received.

Code of Ordinances, City of Memphis, Code 1967, § 2-8; Ord. No. 4473, § 1, 2-21-97. The Code of Ordinance also notes that “[i]f the items sought are in excess of fifty thousand dollars (\$50,000.00) then the purchase must be consummated by written contract signed by the mayor.” Id.

The Memphis Charter also requires competitive bidding in this context. Section 51 of the Memphis Charter states that no contract involving an expenditure of over \$10,000.00 shall be awarded or let to the lowest and best bidder until after the advertisement by at least three publications in a newspaper published and circulated in the City of Memphis within the calendar week before the date fixed in the advertisement upon which bids are to be received. Section 222 of the Memphis Charter also provides for a City purchasing agent to obtain bids from competitive concerns on certain contracts prior to making said purchases from the lowest and best bidder thereof.

b. What procedural requirements must Memphis Light, Gas & Water follow when proceeding through the Request for Proposal process?

The Intervenors suggest that the Request for Proposal process follow basic procedures enumerated for requests for proposals. Section 12-4-106 of the Tennessee Code Annotated, dealing with contracts for professional services, serves as a guide for Request for Proposal procedures. A Request for Proposal for a contract by a city or utility district shall, upon approval by a two-thirds vote of the governing body, be procured through a Request for Proposal process. T.C.A. § 12-4-106(e)(1). The Request for Proposal process in this context invites prospective proposers to participate and indicates the service requirements and the factors used for evaluating the proposals. Id. “Such factors shall include cost, vendor’s qualifications and any additional factor or factors deemed relevant by the procuring entity for the procurement of the service; cost is not to be the sole criteria for evaluation. The contract for such services will be awarded to the best evaluated, responsive proposer.” Id. As set forth above, these factors were clearly not considered as MLG&W had negotiated an agreement with Mr. Lowe prior to the issuance of the Request for Proposal. Based upon the evidence presented, the following procedure used by MLG&W served several purposes for Lowe and MLG&W: (1) the appearance of compliance with the law; (2) the appearance of an open and fair process; (3) the materials and information gathered from competitors could be used to determine what businesses to enter; (4) the arrangement could be structured to shield information from the Tennessee Open Records Law; and (5) only favorable information would be used to inform the public.

- c. **Assuming Memphis Light, Gas & Water was not required to issue a Request for Proposal, was it bound to follow the procedural requirements discussed in the answer to b. once it chose to issue a Request for Proposal?**

MLG&W is required to follow procedural requirements through the end of a selection process once it chooses to issue a Request for Proposal. In Teleprompter of Erie, Inc. v. City of Erie, 567 F.Supp. 1277 (W.D. Penn. 1983), the plaintiff unsuccessfully competed for a cable franchise and brought a due process claim against the City of Erie, Pennsylvania alleging that the party awarded the franchise was not the best responsible bidder. The Court held that Pennsylvania state statutes and a local ordinance created a property interest in the plaintiff's award of the cable franchise. 567 F.Supp. at 1289. Importantly, the Court noted that "[o]nce the Erie City Council decided to solicit competitive bids in accordance with a Franchise Ordinance and Request for Proposal it was bound to adhere to its prior resolution as well as other statutory mandates and award the franchise in a non-arbitrary manner." Id. In Continental Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater New York, Inc., 994 F.Supp. 133 (E.D.N.Y. 1998), the district court disregarded the defendant's claims that because the antitrust laws did not require competitive bidding, they could not be held liable for civil conspiracy charges. 994 F.Supp. at 139. The Court noted however that:

. . . while HIP had no obligation to choose an O&P provider by means of competitive bidding, once HIP affirmatively and voluntarily decided to undertake such a procedure, allegations that the defendants subverted the competitive machinery . . . may provide circumstantial evidence of a conspiracy.

Id.; see also Griswold v. County of Ramsey, 65 N.W.2d 647, 652 (Minn. 1954) (once a city decides to utilize competitive bidding, it must follow all the proper procedures).

In Northwest Petroleum Assoc. v. Minnesota Dept. of Econ. Security, 402 N.W.2d 591 (Minn. App. 1987), the court of appeals affirmed a lower court's ruling that a bidding process was improper because the competitive bidding procedure was not followed. In that case, the Court stated:

The Duluth CAP argues that, as a private nonprofit entity, it is not required to adopt competitive bidding procedures. However, the supreme court has suggested that, even if an entity is not required to use a competitive bidding process, once a competitive bidding process has been adopted, the procedure should be followed "in a manner reasonably designed to accomplish its normal purpose of giving all contractors an equal opportunity to bid and of assuring to the taxpayers the best bargain for the least money."

402 S.W.2d at 595 (citing Griswold, 65 N.W.2d at 652.)

In Lasday v. Allegheny County, 453 A.2d 949 (Penn. 1982), the Supreme Court of Pennsylvania addressed a case where an unsuccessful bidder challenged the authority of Allegheny County to enter into a contract with a gift shop for the operation of four newsstand concessions at the Greater Pittsburgh International Airport. The County undertook to solicit and receive proposals for the operation of four newsstands and two gift shops at the airport. The appellant specifically asked county officials to permit him to submit a proposal to operate the four newsstand concessions only. The County denied his request and then modified the concession package and privately approached two other vendors to secure contracts. Thus, after his request was rejected, and after he invested the time and effort necessary to prepare a proposal in accordance with the county's guidelines, the County awarded the very same concession package to other

vendors. In the County's view, because it was not statutorily obliged to engage in competitive bidding when it embarked on the new concession program, it could proceed in any way it wished to secure contracts as long as it did not act fraudulently, capriciously or in bad faith. The Pennsylvania Supreme Court disagreed, stating:

Whatever the authority of the County to have negotiated the concession contracts privately at the outset, once the County voluntarily undertook to follow a particular procedure, the County was obliged to adhere to that procedure throughout the procurement process. See American Totalisator Co. v. Seligman, 489 Pa. 568, 414 A.2d 1037 (1980). The County was also obliged to conduct the procedure in accordance with basic standards of fairness, an obligation that could not be validly disclaimed, as was attempted here, by a reservation of the right to reject any and all proposals and to negotiate privately with any individual concessionaire.

453 A.2d at 954 (emphasis added). The Court concluded that the County was obliged to "observe basic standards of fairness" when negotiating concession leases. *Id.* at n.7.²

Thus, in this case, once MLG&W decided to use the Request for Proposal method, it was bound to adhere to procedural requirements including the fair consideration of all proposals and fair dealing with prospective respondents. It is an implied condition of every Request for Proposal issued by a government that each responsive proposal submitted will be fairly and honestly considered. Space Age Engineering, Inc. v. United States, 4 Cl. Ct. 739, 741 (1984); Heyer Products Co. v.

² The Lasday Court cited portions of the Model Procurement Code for State and Local Government (American Bar Association Approved Draft, 1979) which deal with the negotiation of contracts procured pursuant to the Request for Proposal method. This Code provides that "[o]fferors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals." *Id.* The commentary to the Code provisions admonishes that "[f]air and equitable treatment of competitors dictates that negotiations be conducted in accordance with ethical business standards." *Id.*

United States, 135 Cl. Ct. 63, 65 (1956). Such was not the case in this situation as MLG&W could not have fairly or honestly considered each proposal because it had been negotiating prior to the issuance of the Request for Proposal with Mr. Lowe solely. Also, the fact that Time Warner and others did not respond does not diminish the defect because Time Warner and other prospective respondents were discouraged from responding. Finally, the fact that the Request for Proposal stated that MLG&W could reject all bidders does not cure the problem either as decided in the Allegheny County case.

4. a. **Assuming Memphis, Light Gas & Water was required to issue a Request for Proposal, but failed to follow the requirements discussed in the answer to b., how is the transfer of interest from A&L Networks-Tennessee, L.L.C. to Memphis Broadband affected?**

Assuming that MLG&W was required to issue a Request for Proposal but failed to follow specific requirements, the transfer of interest from A&L to Memphis Broadband is affected in the following way. The transfer from A&L to Memphis Broadband is void because it violates Tennessee public policy. Failure to follow competitive bidding requirements can result in voiding of contracts as violative of public policy in actions by parties including taxpayers. See e.g., County of Washington v. Counties of Warren and Washington Indus. Dev. Agency, 177 F.R.D. 119 (N.D.N.Y. 1998) ("New York GML § 120-w(e)(4) requires municipalities who enter into contracts for the construction, finance, and operation of solid waste management-resource recovery facilities to use one of two types of competitive bidding processes. Failure to follow the competitive bidding requirements of the GML can result in voiding of the resulting contracts as

violative of New York public policy in actions brought by wronged bidders or by taxpayers”); Telephone Associates, Inc. v. St. Louis County Bd., 350 N.W.2d 398 (Minn. App. 1984) (“The county’s failure to follow the competitive bidding requirement rendered the contract award invalid”); D’Angelo v. Cole, 490 N.W.2d 819 (N.Y. App. 1986) (“ . . . General Municipal Law § 103 requires projects greater than [\$5,000.00] to be submitted to competitive bidding. When, as here, competitive bidding is statutorily required, and a municipality fails to follow that procedure, the contract is completely, not partially, void”).

Failure to follow competitive bidding requirements can result in serious consequences in Tennessee, as can be seen from a 1981 Tennessee Supreme Court decision. In State ex rel. Leech v. Wright, 622 S.W.2d 807 (Tenn. 1981), the Tennessee Supreme Court recognized that once a request for proposal has begun, an entity is required to proceed fairly with such a process. In Wright, the plaintiffs, eleven citizens of Lincoln County and the State Attorney General, appealed from an adverse ruling in the trial court. The plaintiffs maintained on appeal that the proof at trial required a finding that the defendant Wright, the Lincoln County Road Superintendent, was liable for wilful misconduct in office for, among other things, failure to obtain competitive bids before purchasing materials, supplies and equipment. The Tennessee Supreme Court reversed the trial court judgment and remanded the case for an entry of judgment of ouster and a declaration of vacancy in the office of County Road Superintendent. 622 S.W.2d at 819. The Court noted:

There was evidence that defendant purchased tires from Brad Ragan, Inc., a Nashville tire dealer, between August 1978 and December 1979, in a sum approximately \$27,000, without following the minimum requirements for competitive bidding. Defendant testified that Ragan gave good service in changing tires on large

equipment and had “odd-ball” sizes that the Lincoln County Equipment called for, not carried by other tire dealers in the area. Neither those circumstances, nor any other circumstances can relieve public bodies or public officials from the requirement of following the minimum procedures for obtaining competitive bids when the law imposes that obligation.

Id. at 816-17 (emphasis added). The Tennessee Supreme Court in Wright thus found that “the evidence is clear and convincing that defendant failed to follow minimum requirements of competitive bidding.” Id. at 817. This was one reason that the Tennessee Supreme Court ruled that the defendant must be removed from office.

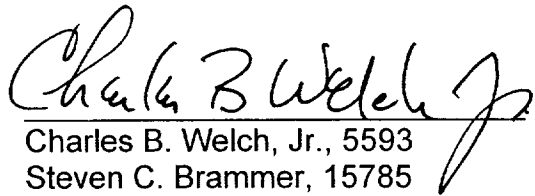
Thus, in this case if MLG&W is required to issue a Request for Proposal but does not do so, the proper procedures have not been followed and any transfer of interest pursuant to MLG&W’s alleged powers would be considered invalid. Because MLG&W did not use the bidding or Request for Proposal or advertising requirements set forth in state law, any transfer of interest which should have been advertised or competitively bid is considered void.

CONCLUSION

In reviewing the Operating Agreement, the TRA is granted broad authority to consider all factors including the conduct and course of dealing of the Applicant and Joint Petitioners. Neither state or local law authorizes the passive investment into a telecommunications venture without the entity providing the services. Finally, the Intervenor maintain that MLG&W’s negotiation of any agreement in this matter be void for failure to follow proper and fair competitive bidding, advertising and Request for Proposal procedures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the parties listed below by placing same in U.S. Mail, postage prepaid, this the 1st day of March, 2001.

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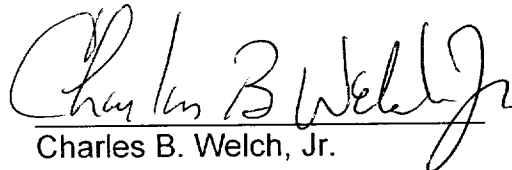
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